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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SHAWN CHOY et al., Plaintiffs and Appellants, v. CENTURY SURETY COMPANY, Defendant and Respondent.	A142591 (City & County of San Francisco Super. Ct. No. CGC-12-525162)

Plaintiffs Shawn Choy and Kayla Cha appeal from a judgment entered after a bench trial rejecting their claim that defendant Century Surety Company (Century) had the duty to provide a defense to Live SF Entertainment, Inc. (Live SF) in an action that plaintiffs brought against Live SF. As part of the settlement of that action, Live SF assigned to plaintiffs its claim against Century for refusing to provide a defense or indemnity in that case. We agree with the trial court that neither the allegations of the complaint in the underlying action nor any facts known to Century when it denied coverage created a duty to provide a defense. We shall therefore affirm the judgment.

Background

The trial court issued a thorough statement of decision which we adopt, with the deletion of matters irrelevant to the issues on appeal and minor stylistic revisions.

In the early morning of January 31, 2009, plaintiffs Shawn Choy and Kayla Cha were in a bar operated by Live SF Entertainment, Inc. (named "Avenue Lounge"). Choy and Cha had drinks with friends. As they exited the bar, an unknown Asian male approximately 22-23 years old began saying "stuff" to Cha. After Choy and Cha had

exited the bar and were walking across the street toward Cha's car, unknown males punched Choy and Cha. Police responded and Cha told police that she could not recall everything because it had happened so fast. The police searched for the suspects but were unsuccessful.

At trial in this action, Choy and Cha presented no evidence concerning the incident other than the police report. Neither of them testified, no employee of Live SF testified, and no other witness testified about the incident. Plaintiffs did not present any evidence that the assailants were minors, that they were intoxicated, or that they had been served any alcohol by Live SF.

On December 30, 2010, Choy and Cha filed suit against Live SF (Super Ct., S.F. City and County, No. CGC-10-506891) ("*Choy v. Live SF*"). In Choy's and Cha's original complaint and their first, second and third amended complaints filed in *Choy v. Live SF,* they alleged:

> Defendants failed to take reasonable measures to prevent or stop the attack against Plaintiffs committed by other patrons of Avenue Lounge.
>
> Defendants negligently failed to provide adequate security, failed to ensure sufficient safety and security procedures, and otherwise negligently acted or failed to act to protect plaintiffs from the violent acts of others.
>
> Defendants . . . knew, or in the exercise of reasonable diligence should have known, that defendants (security employees) were incompetent and unfit to perform the duties for which they were employed, and that an undue risk to persons such as plaintiffs would exist because of the employment.
>
> Despite this advance knowledge, defendants . . . hired and retained [the security employees] as employees, and failed to terminate said employment despite knowledge of the unfitness of said defendants, in conscious disregard of the rights and safety of others, including plaintiffs.
>
> Defendants . . . owed a duty to persons such as plaintiffs to ensure that the security guards that it employs . . . are properly trained and supervised in the performance of their duties.
>
> Defendants . . . breached their duties to plaintiffs by failing to provide adequate training and supervision to its employees.

In none of Choy's and Cha's four complaints did they allege that Live SF had served alcohol to their assailants, or that their assailants were minors, or that the assailants were obviously intoxicated. In none of Choy's and Cha's four complaints do the words "alcohol," "liquor," "intoxicated" or "drunk" appear.

In late July 2012, the parties in *Choy v. Live SF* entered into a settlement agreement. Under the terms of the settlement agreement, Choy and Cha waived all of their claims against the individual defendants, Live SF agreed that Choy and Cha could proceed to trial before a judge, jury, retired judge or commissioner, and that the trial could be by declaration, live testimony or otherwise. Defendant Live SF did not appear at trial. It was also part of the settlement that, regardless of the amount of the judgment, the most that Live SF would be obligated to pay is $500 per month, without any adjustment for interest or inflation.

The only obligor under the settlement agreement is the corporation Live SF. However, by the time Live SF entered into the settlement agreement, it had already ceased to do business and had less than $3,000 in assets. Through the dismissals with prejudice and the release provision of the settlement agreement, Live SF's shareholders have no personal liability for any amount payable under the settlement agreement.

After the settlement agreement was executed, Choy and Cha obtained a judgment against only Live SF in the amount of $5,847,490.05. In the judgment, the court found that Live SF Entertainment is liable to plaintiffs for the following reasons:

> 1. Live SF Entertainment and its employees owed a duty to plaintiffs to take minimally burdensome measures to protect them from imminent and/or ongoing third-patty criminal assaults.
>
> 2. Live SF Entertainment and/or its employees breached their duty to plaintiffs by:
>
> A. Allowing loitering on the. sidewalk immediately in front of Avenue Lounge;
>
> B. Failing to implement a security plan that accounts for the safety of its patrons, including their ingress and egress from Avenue Lounge;
>
> C. Employing an unlicensed security guard to provide security for Avenue Lounge;

D. Failing to perform a criminal background on the bar's security guard before hiring him;
E. Hiring and employing as a security guard an individual convicted of numerous felonies related to, among other things, drugs, weapons, violence, and dishonesty;
F. Failing to train its manager or security guard what to do in the event of an imminent or ongoing assault against a patron;
G. Failing to admonish a patron who was committing the crime of Disturbing the Peace by making comments to another patron that were likely to provoke an immediate violent response;
H. Failing to call 911 at the earliest opportunity after a physical altercation and/or attack appeared likely; and
I. Failing to announce that 911 had been called and that the police were on their way (whether or not it was true).

The words "alcohol," "liquor," "intoxicated" or "drunk" do not appear in the judgment. Nowhere in the judgment did the court make findings that would overcome the legislatively declared rule "that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication." (Civ. Code, § 1714, subd. (b).) The judgment did not impose liability on Live SF by reason of its sale or service of alcohol.

At the time of the incident, Live SF was the named insured under policy No. CCP552431 issued by Century. The statement of decision then recites policy provisions covering bodily injury and personal injuries that do not apply to "any actual, threatened or alleged assault or battery." On appeal, plaintiffs do not question the trial court's determination that there was no possible coverage under those provisions.

The policy also contains a liquor liability coverage part. The insuring agreement of this coverage part reads: "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'injury' to which this insurance applies if liability for such 'injury' is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for 'injury' to which this insurance does not apply."

Live SF tendered *Choy v. Live SF* to Century under the policy. Century declined to defend because the claims asserted by Choy and Cha fell within the assault and battery

exclusion. In the January 31, 2011 denial letter, Century stated that "it reserves the right to rely on other portions of the policy's language." The letter also stated that the "policy includes liquor liability coverage as well but because the complaint includes no allegations of liquor liability, we have not discussed that portion of the policy here . . . as it does not apply."

More than a year after the claim was presented to Century, an attorney for the insurer of Live SF's insurance broker wrote to Century's counsel. Century's counsel responded with a letter dated June 26, 2012, which argued that there was no potential for coverage under the policy's liquor liability coverage part because the complaint in *Choy v. Live SF* did not seek to impose liability on Live SF by reason of the sale or service of alcohol and because Century had no evidence of facts that would support Choy and Cha asserting such a claim in the future.

In its statement of decision, the trial court found in Century's favor with the following explanation: "Because the policy's liquor liability coverage part applies only to claims for which 'liability . . . is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage,' there is no duty to indemnify under the policy's liquor liability coverage part. Accordingly, Century did not breach the policy by failing to indemnify Live SF for the judgment or the settlement agreement.

"The duty to defend is determined 'from all of the information available to the insurer at the time of the tender of the defense.' (*B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal.App.4th 78, 92.) As the court noted in *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property & Casualty Company of America* (2011) 197 Cal.App.4th 424, 431: ' "the Supreme Court [has] reaffirmed that the extrinsic facts which may create a duty to defend must be *known by the insurer* at the *inception* of the third party lawsuit." '

"The burden of proof on the duty to defend requires the insured to 'show that the underlying claim *may* fall within policy coverage; the insurer must prove it cannot.' (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 297, 300.)

"The evidence at trial established that at the time of tender, Century had available to it the complaint filed in *Choy v. Live SF*. The complaint said nothing about alcohol or liquor and did not seek to impose liability on Live SF by reason of its sale or service of alcohol. Accordingly, Choy's and Cha's complaint did not create a potential for coverage under the policy's liquor liability coverage part.

"Plaintiffs' case depends substantially on a note made to the claim file by Century's adjuster William Webb. The note was the adjuster's summary of the incident based on his review of the Choy and Cha complaint. In his note, the adjuster states that 'claimants were [*sic*] assault [*sic*] and battered by over served patrons of the bar.' Elsewhere in the same note, the adjuster wrote the contradictory comment that 'there is little information that the unnamed assailants were either drunk or served at the insured's establishment.' Yet Webb testified (via deposition) that he does not know why he wrote that the assailants were over served, and that there was nothing in the claims file to support those notations. When the adjuster later sent the January 31, 2011 denial letter, he noted that, 'because the complaint includes no allegations of liquor liability, we have not discussed that portion of the policy.'

"Plaintiffs also presented evidence of the police report. However, nowhere in the police report is there any statement that Choy, Cha or their assailants were intoxicated or had been over-served alcohol by Live SF, and nowhere in the police report is there an allegation or statement that Choy, Cha or any of their assailants were minors. Thus even if Webb had seen the police report as extrinsic evidence available at the time that the decision was made not to defend the underlying action, there is nothing in the police report that suggests coverage.

"As stated above, there is no allegation in the Choy and Cha complaint that Live SF had served alcohol to their assailants let alone that they were over-served, and Choy and Cha presented no evidence at trial that their assailants had been over-served alcohol by Live SF (indeed, no evidence that they had been served alcohol at all).

"In any event, over-service of alcohol by itself does not overcome the legislatively declared rule 'that the furnishing of alcoholic beverages to an intoxicated person is not

the proximate cause of injuries resulting from intoxication.' (Civ. Code, § l714, subd. (b).) For there to have been a potential that Choy and Cha would amend their complaint to impose liability on Live SF by reason of its sale or service of alcohol, there needed to be evidence that Live SF had served alcohol to obviously intoxicated minors. (*Strang v. Cabrol* (1984) 37 Cal.3d 720, 724-725.) Neither the adjuster's note nor any other evidence presented by Choy and Cha supplies the missing facts that the assailants were obviously intoxicated minors who had been served by Live SF.

" 'An insured may not trigger the duty to defend by speculating about extraneous "fact" regarding potential liability or ways in which the third party claimant might amend its complaint at some future date. This approach misconstrues the principle of 'potential liability' under an insurance policy. "Although an insurer's duty to defend is broader than the duty to indemnify, the duty to defend depends upon *facts* known to the insurer at the inception of the suit. [Citations.] [¶] Our Supreme Court, anticipating imaginative counsel and the likelihood of artful drafting, has indicated that a third party is not the arbiter of the policy's coverage. [Citations.] A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage." ' (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1114 . . . .)

" 'As the court held in *Friedman Prof. Management Co., Inc. v. Norcal Mutual Ins. Co.* (2004) 120 Cal.App.4th 17, 34-35: '[T]he universe of facts bearing on whether a claim is potentially covered . . . does not include *made up* facts, just because those facts might naturally be supposed to exist along with the known facts.' (See also *Baroco West, Inc. v. Scottsdale Ins. Co.* (2003) 110 Cal.App.4th 96, 104 [' "[a]ssertions of potential coverage which are based entirely on speculation do not give rise to a duty to defend" ']; *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.* (9th Cir. 1994) 40 F.3d 968, 971 [(*Microtec*)] [no duty to defend where claims alleged in the complaint were not covered and where insured failed to present evidence extrinsic to the complaint of all of the facts essential to a potential new claim].)

"Even when there are extrinsic facts suggesting that a viable covered claim might be added to a complaint in the future, the insurer has no immediate duty to defend.

Instead, the law requires the insured to retender the amended complaint and imposes on the insurer the duty to defend only the amended pleading. (*Low v. Golden Eagle Ins. Co.* (2002) 99 Cal.App.4th 109, 114, fn. 5 [‘if the plaintiff . . . does succeed in amending the complaint along the theoretical lines mentioned above, the insured could retender to its insurer the duty to defend issue’]; *Marie Y. v. General Star Indemnity Co.* (2003) 110 Cal.App.4th 928, 960 [insurer had no duty to defend original complaint but had duty to defend the amended complaint once it was tendered to it].)

“. . . If Choy and Cha had amended their complaint to assert a claim based on the sale or service of alcohol, Century’s duty to defend would have commenced only upon its receipt of a tender of the amended complaint. In any event, Choy and Cha failed to present extrinsic evidence that would satisfy the elements of a liquor liability claim, i.e., service of alcohol to obviously intoxicated minors. (Civ. Code, § 1714, subd. (b); Bus. & Prof. Code, §§ 25602, subd. (b), 25602.l; *Strang v. Cabrol*[*, supra,*] 37 Cal.3d 720, 724-725 [absent sale or service of alcohol to an obviously intoxicated minor, the sale or service of alcohol is *not* the proximate cause of damage or injury caused by the intoxicated person].) In the words of *Microtec*, [*supra,* 40 F.3d at page 971,] ‘because [Choy and Cha] elected not to make that claim’ and because Choy and Cha did not ‘produce any evidence . . . that [they] had suffered damages because of’ Live SF’s sale or service of alcohol, Century had no duty to defend under the liquor liability coverage part of the policy. [Fn. omitted.]

“To the extent that plaintiffs contend that Century breached its duty to defend because it did not investigate whether their assailants were minors, the court finds this argument without merit. The extent of a liability insurer’s duty to investigate upon the tender of a lawsuit filed against its insured was stated in *Baroco West, Inc.* [*v. Scottsdale Ins. Co.*], *supra,* 110 Cal.App.4th at page 103: ‘After receiving a tender of defense, the insurer satisfies its duty to investigate by considering the complaint and the terms of the policy. Although extrinsic facts may also give rise to a duty to defend, such facts must be known at the time of tender and must reveal a potential for liability.’ ([Fns. omitted;] cf. *Tibbs v. Great American Ins. Co.* (9th Cir. 1985) 755 F.2d 1370, 1375 [‘[the adjuster]

conducted little or no investigation into Great American's duty to defend: he did not compare [the plaintiffs] claim with the insurance company policy or even inspect the policy itself'].)

"The evidence established that Century considered the allegations of Choy's and Cha's complaint and the terms of the policy. Furthermore, even if a liability insurer had a duty to investigate that extends beyond reviewing the third-party complaint, the policy and any extrinsic facts presented to it, Choy and Cha failed to present evidence of any facts that, if discovered by Century, would have led it to conclude that Choy and Cha possessed a claim potentially covered by the policy. To have a claim potentially covered by the policy's liquor liability coverage part, Choy and Cha needed to have facts that would 'prove the elements of the claim,' i.e., that would support the imposition of liability on Live SF by reason of its sale or service of alcohol. (*Microtec, supra,* 40 F.3d at p. 971.) Because of Civil Code section 1714, subdivsion (b) and Business and Professions Code sections 25602, subdivision (b) and 25602.1, Choy and Cha would have needed evidence that Live SF had knowingly served alcohol to obviously intoxicated minors. At trial, Choy and Cha did not present any evidence that they or their assailants were minors, that any of them was obviously intoxicated or, indeed, that Live SF had served them alcohol. Speculation about what an investigation might have uncovered is insufficient. (See also Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2013) [¶] 7:587 ['The *adequacy* of the insurer's investigation should *not* control the duty to defend. The key question is whether there was a potential for coverage.'].)"

Discussion

With a single exception, there is no dispute over the accuracy of the facts set forth in the trial court's statement of decision, and we conclude that the court's analysis of the law is correct and need not be repeated at length.

Plaintiffs' principal argument on appeal centers on the notation in the claims summary report made by Webb, the attorney who acted as the adjuster of plaintiffs' claim for coverage, that the plaintiffs were assaulted "by over served patrons of the bar."

Plaintiffs contend that there is no evidence to support the trial court's statement that the note represented Webb's summary based solely on his review of the complaint, and that the note constituted a prima facie showing that the assailants had been drinking in Live SF's bar, sufficient to trigger a duty to defend against plaintiffs' claim. However, as the trial court also pointed out, the same note also stated that "there is little information that the unnamed assailants were either drunk or served at the insured's establishment." The claim file contains no other information supporting the reference to "over served patrons" and Webb was unable to explain that reference or to identify any source of his information other than the pleadings in the underlying action, which contain no support for the statement.

Moreover, as the trial court also correctly explained, even if the notation were taken to indicate that Webb was informed that the assailants were intoxicated, that would not have been sufficient to indicate potential coverage under the liquor liability provision of Century's insurance policy. This provision provides coverage for claims based upon "the selling, serving or furnishing of any alcoholic beverage." However, there can be no liability for the selling or serving of alcoholic beverages unless sold or served to an "obviously intoxicated minor." (Bus. & Prof. Code, §§ 25602, subds. (b), (c), 25602.1; Civ. Code, § 1714, subd. (b).) As our Supreme Court recently summarized and explained: "Beginning in 1971 this court decided three cases that together reversed decades of previous law and recognized, for the first time, that sellers or furnishers of alcoholic beverages cold be liable for injuries proximately caused by those who imbibed. [Citations.] In 1978, the Legislature abrogated the holdings of those cases, largely reinstating the prior common law rule that the consumption of alcohol, not the service of alcohol, is the proximate cause of any resulting injury." (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 701.) The 1978 amendments to the Business and Professions Code and Civil Code provide "narrow exceptions to this broad immunity" (*id.* at p. 701) but only for furnishing alcoholic beverages to an "obviously intoxicated minor." (Bus. & Prof. Code, § 25602.1; Civ. Code, § 1741, subd. (d)(1).) As the trial court stated, there is no evidence that plaintiffs' assailants were minors, that they were obviously intoxicated, or that they

had been served alcoholic beverages at the Avenue Lounge, much less that Century had knowledge of any such facts. (See *Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Company*, *supra*, 197 Cal.App.4th at p. 431 ["the extrinsic facts which may create a duty to defend must be *known by the insurer* at the *inception* of the third party lawsuit"].)

While an insurer's duty to defend arises whenever the insured establishes a potential for, or possibility of, coverage (e.g., *Montrose Chemical Corp. v. Superior Court, supra,* 6 Cal.4th at pp. 299-300), "an 'insured may not trigger the duty to defend by speculating about extraneous "facts" regarding potential liability *or ways in which the third party claimant might amend its complaint at some future date.* This approach misconstrues the principle of "potential liability" under an insurance policy. "Although an insurer's duty to defend is broader than the duty to indemnify, the duty to defend depends upon *facts* known to the insurer at the inception of the suit. [Citations.] . . . [¶] . . . *A corollary to this rule is that the insured may not speculate about unpled third party claims to manufacture coverage.*' " (*Ulta Salon, Cosmetics & Fragrance, Inc. v. Travelers Property Casualty Company, supra,* 197 Cal.App.4th at p. 433.)

Finally, plaintiffs argue that even if, because of the Business and Professions Code and Civil Code sections cited above, SF Live could not have been held liable for serving alcoholic beverages to their assailants, the scope of coverage under Century's insurance policy is not limited by the terms of the statute. "While it may be true," plaintiffs argue, "that a claim for liability for the service of alcohol will likely be invalid in California in the absence of service to an obviously intoxicated minor, no rule of law prohibits an insurance policy from providing coverage for a legally invalid claim." Moreover, plaintiffs' argument continues, an insured would reasonably understand the liquor liability provision in Century's policy to provide coverage against a claim for having caused injury by "the selling, serving or furnishing of any alcoholic beverage," whether or not the claim was meritorious. However, as Century argues, the fallacy of this argument is that the plaintiffs' complaints in the underlying action, while alleging numerous grounds for the imposition of liability on SF Live, did not allege that liability

arose because of the service of alcoholic beverages to the assailants. While additional unpled facts known to Century might have given rise to the duty to defend, there is no evidence that Century had knowledge of any such facts, if indeed there are any such facts.

For this reason, *Troutt v. Colorado Western Ins. Co.* (9th Cir. 2001) 246 F.3d 1150, cited by plaintiffs, is distinguishable. In that case the court held that under a similar liquor liability provision there was a duty to defend an action alleging liability "under a set of facts that included alcohol as a causing factor" (*id.* at p. 1159) despite the applicability of the Montana Dram Shop Act, which in relevant respects is comparable to the California statutes. While the court held the insurance policy provision to be broader than the dram shop act, the insurer in that case, unlike Century, had knowledge of facts indicating that the accident in question arose at least in part from the defendant's business of serving alcohol. (*Id.* at p. 1155.)

In short, the trial court correctly held that Century had no duty to provide a defense in this case because the several complaints in the underlying action did not allege that SF Live was liable for having served alcoholic beverages to plaintiffs' assailants and because Century had no knowledge of facts that might have imposed liability on that basis.

Disposition

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.